

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD JASON VORE,

Defendant-Appellant.

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UNPUBLISHED

May 21, 2009

No. 282747

Missaukee Circuit Court

LC No. 07-002134-FC

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and one count of assault with intent to sexually penetrate, MCL 750.520g(1). Defendant was sentenced to serve concurrent sentences of 57 months to 10 years' imprisonment on the assault with intent to sexually penetrate conviction, and 12 to 30 years' imprisonment for each of the CSC I convictions. Because there was no abuse of discretion in the admission of challenged evidence and counsel was not ineffective for failing to object to the admissible evidence, we affirm.

On appeal, defendant raises two issues, neither of which were raised below. The alleged errors, then, are unpreserved and we review such issues for plain error that affected defendant's substantial rights. *People v Shafier*, 277 Mich App 137, 143; 743 NW2d 742 (2007). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence. *Id.*

Defendant first asserts that the circuit court plainly erred in allowing evidence that was not relevant to the accusations against him and was unfairly prejudicial. Specifically, defendant argues that the circuit court erred in allowing the admission of evidence concerning defendant's participation in an attempted joke by affixing a childhood nude photo of the complainant on the complainant's bedroom door for his friends to see and evidence concerning defendant's lack of sexual relations with his spouse.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Wayne Co v State Tax Comm*,

261 Mich App 174, 196; 682 NW2d 100 (2004). Under this broad definition, evidence that is useful in shedding light on any material point is admissible. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). To be material, evidence does not need to relate to an element of the charged crime or an applicable defense. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Rather, the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs the questions of relevance and materiality. *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008).

Several witnesses testified about the photo of complainant, but were not able to agree on the age of the complainant in the photo.<sup>1</sup> Defendant states that this evidence was admitted to show he was a sexual deviant and that the evidence does not corroborate the complainant's allegations of sexual abuse. However, the evidence is relevant to demonstrate the inappropriate sexual boundaries that defendant had with the complainant, a child. Defendant encroached the private boundary of the complainant's sexuality by being able to produce the photo, interacting with the complainant based on sexuality, using his status in the home to take part in posting the photo, and publicly exploiting the child's sexuality. Defendant's response to the complainant's peers—offering to bet them that the complainant's genitalia was larger than their genitalia—further illustrates the defendant's lack of self-consciousness in involving himself in the complainant's sexuality. This evidence relates to the elements of the crimes for which defendant stands convicted.

Defendant also argues that evidence of the lack of sexual relations with his wife was not relevant. However, a theory of the prosecution was that defendant met his sexual needs through the complainant. There was testimony about the closeness of defendant's relationship to the complainant, to the exclusion of the other members of the household. An issue concerning the prolonged lack of sexual intimacy between defendant and spouse could arguably be information that infers defendant's sexual needs were met through the complainant, which is directly the matter in issue. This evidence is relevant to the prosecutor's theory of the case.

Defendant argues that the above evidence, even if relevant, was inadmissible because of the danger of unfair prejudice. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). Evidence is always offered to prejudice the opponent, so only evidence that will *unfairly* prejudice in comparison to its probative value is excluded. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). Evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than defendant's guilt or innocence. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

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<sup>1</sup> The complainant thought he was less than five in the photo, defendant said he was two or three, his mother thought he was 12, and the police estimated that he was around eight years old.

The evidence in issue was neither extraordinarily probative nor significantly prejudicial. As discussed above, the photo evidence was evidence that merely added to the depiction of defendant's relationship with the complainant and had some tendency to support the strongest evidence—the complainant's testimony about the sexual acts. Evidence that defendant showered and slept with the complainant, and used pornography in the home was offered for a similar purpose. Because the photo did not directly address the question of sexual contact, and because the vast majority of the testimony concerning the photo indicated that the photo was posted not by defendant alone and was meant only as a joke, it would have been unlikely that the jury gave it weight beyond what it was offered for.

As for the evidence regarding the lack of intimacy in his marital relationship, the prosecutor used this evidence to support the theory that defendant's primary sexual relationship was with the complainant. It is unlikely that the jury would view this evidence as any thing more than supportive of the prosecutor's theory and the complainant's testimony. Further, evidentiary error does not merit reversal in a criminal case unless, after review of the case, it appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this credibility contest, the jury, after much deliberation, chose to believe the complainant's testimony rather than defendant's. We will not second-guess the jury on matters of witness credibility.

Defendant also argues that his trial counsel's performance was deficient. His argument, however, is that counsel was deficient because he did not object to the admission of the above referenced evidence. As discussed above, the challenged evidence was admissible. Counsel is not ineffective for failing to make a futile objection. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Peter D. O'Connell  
/s/ Brian K. Zahra